Jerneh Insurance Corporation Sdn Bhd v Hai Heng Enterprise Sdn Bhd

HIGH COURT (SANDAKAN) — ADMIRALTY IN PERSONAM NO S(27)-01 OF 1997
RICHARD MALANJUM J
30 JULY 2002

Shipping and Navigation — *Carriage of goods — Damage and/or loss to goods — Goods damaged by water — Carrier's liability — Difference between liability of common carriers and private carriers — Obligation of carrier to provide seaworthy vessel at the commencement of the voyage — Whether burden was on carrier to prove that vessel was seaworthy at the commencement of the voyage — Whether carrier had discharged burden*

Shipping and Navigation — *Carriage of goods — Common carrier — Duty of care — Whether duty of care expected of a common carrier more onerous than that expected of a private carrier*

Shipping and Navigation — *Merchant shipping — Seaworthiness of vessel — Obligation imposed by common law, nature of*

The plaintiffs were the insurers of the owners of 5,107 bags of Muriate of Potash weighing 755.350 metric tonnes ('the cargo'), at whose risk the same was shipped. The cargo was shipped on the defendants' barge — the 'Hai Heng No 26' ('the vessel'). The plaintiffs were subrogated to the rights of the owner and this was the plaintiffs' claim against the defendants for damages arising from the defendants' breach, which resulted in the cargo being damaged by water. The plaintiffs pleaded, inter alia, that the defendants were the bailees of the cargo and/or common carriers for reward and were therefore under a duty to exercise all proper and reasonable care in the loading, stowage, handling, custody, care, carriage and discharge and delivery of the cargo. The defendants denied any breach of duty to take reasonable care and stated that even if they were under a duty to provide a seaworthy vessel, they had done so as evident by the fact that the vessel was afloat for 16 days from the commencement of the voyage before it finally sank. At the commencement of the trial, the parties submitted the agreed issues to be tried were: (a) whether the vessel was seaworthy before and at the commencement of the voyage; and (b) whether the damage or loss was caused by an underwater object coming into contact with the barge whilst being manoeuvred to berth alongside the jetty. As regards the condition of the vessel, the defendants' witness, DW1, testified that the vessel underwent repairs sometime in November and December 1994 at a cost of over RM100,000 by Weldan Marine Services Sdn Bhd. The repairs were done to the whole of the bottom plates, patching the bottom plates and the rewelding of corroded holes. DW1 further testified that the captain of the tug boat ('Totuh') had made a marine protest note to state that he heard some objects striking the bottom of the vessel. Totuh however, was not available as a witness. For the plaintiffs, PW2

testified that his inspection of the vessel showed that the bottom plating was in a state of heavy corrosion and there were signs of wastage of internal strength members. PW2 was also of the opinion that if the vessel had been hit by an underwater object as claimed by the defendants, there should have been clear and severe indentation, scratches and marks but in this case, there were no such signs of indentation, scratches or marks. The plaintiffs' other witness, PW3, testified that he agreed with the evidence of PW2 that the damage to the hull plating of the dumb barge could be attributed to corrosion and that if the vessel had been hit by an underwater object, there would be signs of physical impact at the vicinity of the holes at the bottom plating.

Held, allowing the plaintiff's claim:

(1) There was a difference between common carriers and private carriers in terms of exposure to liabilities. If the defendants were to be considered common carriers, the duty of care expected was more onerous. A common carrier was absolutely responsible to the owner of the goods carried for any loss or damages to them. On the other hand, a private carrier's duty was not as onerous, although it was not absolved from all liabilities to the owner of the cargo. A private carrier was under a duty to exercise due care and diligence as a bailee for reward. Since the defendants had not raised this issue, it was too late for the defendants to now raise this issue, as it was not part of the agreed issues to begin with (see pp 341G–H, 342B, H).

(2) The obligation to take reasonable care included the period when the cargo remained on board the vessel at the jetty, in the possession and under the control of the defendants (see p 343G–H).

(3) The obligation of the defendant to provide a seaworthy vessel at the commencement of the voyage under common law or as implied by law was absolute in nature. Since the Hague/Hague-Visby Rules had not been pleaded by the defendants, the only obligation of seaworthiness was the absolute obligation imposed by common law. The nature of the absolute obligation of a ship owner encompassed the responsibility of any unseaworthiness of the vessel regardless of the cause, negligence or otherwise. In the instant case, the disclosure of the repair works by Weldan Marine Services Sdn Bhd on the vessel was of little assistance to the defendants' absolute responsibility of providing a seaworthy vessel at the commencement of the voyage (see p 344C–F).

(4) A vessel was seaworthy if it had a degree of fitness which an ordinary careful and prudent owner would require his vessel to have, at the commencement of her voyage, having regard to all the probable circumstances of it. To that extent, the ship owner undertook absolutely that the vessel was fit and ignorance was no

excuse. If the defect existed, the question to be put was whether a prudent ship owner would have required that the defect be made good before sending the vessel to sea, had he known of the defect. If he would, then the vessel was not seaworthy within the definition of the meaning (see p 345B–D). A

(5) The burden was on the defendants to prove that the vessel was seaworthy at the commencement of the voyage and the defendant had not discharged that burden. Accordingly, the prima facie evidence of unseaworthiness had not been rebutted. Hence, the inevitable conclusion was that the vessel was not seaworthy at the commencement of the voyage (see p 346F–H). B

(6) In the event that the court was wrong and the burden of proving that the vessel was not seaworthy was on the plaintiffs, the issue to be considered was whether there was any substance to the defendants' assertion that the vessel came into contact with submerged objects as it was being manoeuvred to berth at the jetty. Since Totuh was not available as a witness, the defendants did not have any direct evidence to prove its assertion and had to rely mostly on the evidence of DW3. Compared with the testimony of PW2, the court was inclined to accept the evidence of PW2. Further, PW2's evidence of the corrosion was also supported by photographs. The court was also inclined to accept the testimony of PW3 that Totuh could not have heard any impact at the bottom of the barge as he was quite far away. the plaintiffs' version was more credible on the balance of probabilities. Therefore, it followed that the vessel was unseaworthy at the commencement of the voyage (see pp 347A, 349F, 351B, E–F, 352A). C D E F

[Bahasa Malaysia summary

Plaintif-plaintif adalah penanggung insurans pemilik-pemilik 5,107 beg Muriate of Potash seberat 755.350 tan metrik ('kargo tersebut'), atas risiko yang mana kargo tersebut telah dihantarkan. Kargo tersebut telah dihantar di atas barj defendan-defendan — 'Hai Heng No 26' ('kapal tersebut'). Plaintif-plaintif telah disubrogasikan kepada hak pemilik tersebut dan ini merupakan tuntutan plaintif-plaintif terhadap defendan-defendan untuk ganti rugi yang berbangkit daripada keingkaran defendan-defendan, yang mana menyebabkan kargo tersebut menjadi rosak akibat air laut. Plaintif-plaintif memplid, antara lainnya, bahawa defendan-defendan adalah baili kargo tersebut dan/atau merupakan pengangkut awam yang diupah dan adalah di bawah satu kewajipan untuk melaksanakan dengan segala pengamatan yang wajar dan berpatutan dalam pemunggahan, pengaturmuatan, pengendalian, penjagaan, sikap berjaga-jaga, pengangkutan dan penurunan serta penghantarserahan kargo tersebut. Defendan-defendan telah menafikan sebarang keingkaran kewajipan untuk bersikap berjaga-jaga dengan wajarnya dan menyatakan bahawa G H I

meskipun ianya di bawah satu kewajipan untuk memperuntukkan sebuah kapal layak layar, ianya telahpun melakukan sedemikian sepertimana yang jelas melalui fakta bahawa kapal tersebut berada di laut selama 16 hari daripada permulaan pelayaran tersebut sebelum ia tenggelam akhirnya. Pada permulaan perbicaraan tersebut, pihak-pihak tersebut telah mengemukakan isu-isu yang dipersetujui supaya dibicarakan seperti berikut: (a) sama ada kapal tersebut layak layar sebelum dan pada permulaan pelayaran tersebut; dan (b) sama ada kerosakan atau kerugian tersebut telah disebabkan oleh sebuah objek bawah laut yang tersentuh dengan barj ketika sedang dikendalikan untuk menghimpit ke tepi jeti. Berhubung keadaan kapal tersebut, saksi defendan-defendan, DW1, memberi keterangan bahawa kapal tersebut telah menjalani kerja-kerja pembaikan dalam bulan November dan Disember 1994 pada kos yang melebihi RM100,000 oleh Weldan Marine Services Sdn Bhd. Pembaikan telah dilakukan pada keseluruhan plat-plat dasar, dengan menampal plat-plat dasar dan pengimpalan semula lubang-lubang yang terkakis. DW1 selanjutnya memberi keterangan bahawa kapten bot tunda ('Totuh') telah membuat satu nota bantahan marin untuk menyatakan bahawa beliau terdengar dentuman objek-objek pada dasar kapal tersebut. Totuh walau bagaimanapun tiada untuk memberi keterangan sebagai saksi. Untuk plaintif-plaintif, PW2 telah memberi keterangan bahawa pemeriksaan oleh beliau akan kapal tersebut menunjukkan bahawa plat dasar berada dalam keadaan yang amat berkarat dan terdapat tanda-tanda susutan bahan-bahan kukuhan dalaman. PW2 juga berpendapat bahawa jika kapal tersebut telah dilanggar oleh sebuah objek bawah laut sepertimana yang didakwa oleh defendan-defendan, tentunya terdapat lekuk yang jelas dan teruk, calar-calar serta kesan-kesan tetapi dalam kes ini, tidak terdapat tanda-tanda lekuk, calar-calar atau kesan-kesan yang sedemikan. Saksi plaintif-plaintif yang lain, PW3, memberi keterangan bahawa beliau bersetuju dengan keterangan PW2 bahawa kerosakan pada plat badan kapal barj mungkin disebabkan oleh karat dan bahawa jika kapal itu telah dilanggar oleh sebuah objek bawah laut, tentunya terdapat tanda-tanda impak fizikal di sekitar lubang-lubang pada plat dasar.

Diputuskan, membenarkan tuntutan plaintif-plaintif:

(1) Terdapatnya perbezaan antara kapal angkut biasa dan kapal angkut persendirian dari segi pendedahan kepada liabiliti-liabiliti. Jika defendan-defendan dianggap sebagai kapal angkut biasa, kewajipan berjaga-jaga yang diharapkan adalah lebih berat. Sebuah kapal angkut biasa adalah bertanggungjawab secara mutlaknya kepada pemilik barangan yang diangkut bagi sebarang kerugian atau ganti rugi kepadanya. Sebaliknya, kewajipan kapal angkut persendirian adalah tidak begitu berat, meskipun ianya tidak terlepas daripada semua liabiliti terhadap pemilik kargo tersebut. Sebuah kapal angkut persendirian adalah di bawah satu kewajipan untuk bertindak dengan penuh ketekunan dan

melaksanakan penjagaan yang perlu sebagai baili untuk mendapatkan upah. Oleh kerana defendan-defendan telah tidak membangkitkan isu ini, ianya adalah sudah lewat untuk defendan-defendan membangkitkan isu ini kini, oleh kerana ianya bukan sebahagian daripada isu-isu yang disetujui pada asalnya (lihat ms 341G–H, 342B, H).

(2) Kewajipan untuk berjaga-jaga dengan wajarnya termasuk tempoh ketika kargo tersebut berada di atas kapal di jeti tersebut, dalam milikan dan di bawah kawalan defendan-defendan (lihat ms 343G–H).

(3) Kewajipan defendan-defendan untuk memperuntukkan sebuah kapal yang layak layar pada permulaan pelayaran tersebut di bawah common law atau sepertimana yang tersirat oleh undang-undang adalah bersifat mutlak. Oleh kerana Kaedah-Kaedah Hague/Hague-Visby telah tidak diplidkan oleh defendan-defendan, satu-satunya kewajipan layak layar adalah kewajipan mutlak yang dikenakan oleh common law. Sifat kewajipan mutlak tuanpunya sebuah kapal merangkumi kewajipan bagi sebarang ketaklayaklayaran kapal tersebut tanpa menghiraukan sebab, kecuaian atau sebaliknya. Dalam kes semasa, pendedahan mengenai kerja-kerja pembaikan oleh Weldan Marine Services Sdn Bhd ke atas kapal tersebut tidak banyak membantu tanggungjawab mutlak defendan-defendan bagi memperuntukkan sebuah kapal layak layar pada pada permulaan pelayaran (lihat ms 344C–F).

(4) Sebuah kapal dianggap layak layar jika ianya mempunyai tahap keadaan baik di mana seorang pemilik yang mempunyai sikap berhemat dan berjaga-jaga perlukan bagi kapalnya, ketika permulaan pelayarannya, dengan menimbangkan segala keadaan-keadaan yang berkemungkinan baginya. Setakat itu, pemilik kapal mengakujanji secara mutlaknya bahawa kapal tersebut berada dalam keadaan baik dan tidak mengetahui keadaan itu bukannya suatu alasan. Jika wujudnya sebarang kecacatan, persoalan yang akan dikemukakan adalah sama ada seorang pemilik kapal yang berhemat tentunya menghendaki supaya kecacatan tersebut diperbaiki sebelum melepaskan kapal tersebut ke laut, sekiranya beliau mengetahui mengenai kecacatan tersebut. Jika beliau melakukannya, maka kapal tersebut adalah tidak layak layar di dalam lingkungan definisi maksudnya (lihat ms 345B–D).

(5) Beban adalah ke atas defendan-defendan untuk membuktikan bahawa kapal tersebut adalah layarlayak pada permulaan perlayaran dan defendan-defendan telah tidak melaksanakan bebanan itu. Berikutan itu, keterangan prima facie mengenai ketaklayaklayaran telah tidak disangkal. Oleh itu, kesimpulan yang tidak dapat dielakkan adalah bahawa kapal tersebut adalah tidak layak layar pada permulaan perlayaran tersebut (lihat ms 346F–H).

A (6) Sekiranya mahkamah salah dan bebanan membuktikan bahawa kapal tersebut tidak layak layar terletak pada plaintif-plaintif, isu untuk dipertimbangkan adalah sama ada terdapatnya sebarang kebenaran kepada penegasan defendan-defendan bahawa kapal tersebut terkena/tersentuh objek yang tenggelam ketika ianya sedang dikendalikan untuk menghimpit jeti. Oleh kerana Totuh B tiada untuk memberi keterangan sebagai saksi, defendan-defendan tidak mempunyai sebarang keterangan langsung untuk membuktikan penegasannya dan terpaksa bergantung kebanyakannya pada keterangan DW3. Berbanding dengan testimoni PW2, mahkamah adalah didorong untuk menerima C keterangan PW2. Selanjutnya, keterangan PW2 mengenai keadaan karat adalah juga disokong oleh gambar-gambar. Mahkamah adalah juga didorong untuk menerima testimoni PW3 bahawa Totuh mungkin tidak terdengar sebarang impak pada dasar barj tersebut kerana beliau berada agak jauh. Versi plaintif-plaintif lebih boleh dipercayai atas imbangan kebarangkalian. D Oleh itu, adalah diikuti bahawa kapal tersebut adalah tidak layak layar pada permulaan pelayarannya (lihat ms 347A, 349F, 351B, E–F, 352A).]

Notes

E For cases on carriage of goods generally, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1013–1209.

For cases on merchant shipping generally, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1262–1339.

Cases referred to

F *'Asia Star', The; Lam Huat Lighterage Co v Owners of Freight and/or Cargo on MV 'Asia Star' and/or Proceeds of Sale thereof* [1980] 1 MLJ 261 (refd)

Bradlev v Federal SN Co (1926) 2 LR 446 (refd)

Burges v Wickham (1863) 3B & S 669 (refd)

G *Century Mining Ltd v Loo Kee Trading Co & Anor* [1982] 1 CLJ 33 (refd)

Gibson v Small (1853) 4 HLC 353 (refd)

Kopitoff v Wilson [1875-76] 1 QBD 377 (refd)

Nyalchand Motichand & Co v AS Mohamad Mydin; V Varusay Rawther third party [1952] MLJ 190 (refd)

H *Smith, Hogg & Co Ltd v The Black Sea & General Insurance Co Ltd* 162 LT 11; [1940] AC 997 (refd)

Golden Lake, The [1982] 2 Lloyd's Rep 632 (refd)

Legislation referred to

I Carriage of Goods by Sea Act 1971 [UK]

Civil Law Act 1956 s 11

Evidence Act 1950 s 114(g)

Peter Vung (*Jayasuriya Kah & Co*) for the plaintiffs. A
Edwin Tsen (*Tan Pang Tsen & Co*) for the defendants.

Richard Malanjum J: In this action, the plaintiffs were the insurers of the owners of the cargo, namely, 15,107 bags of Muriate of Potash weighing 755.350 metric tonnes in laminated PP bags at 50kg per bag ('the cargo'), at whose risk the same was shipped and were subrogated to the rights of the B owners.

In their amended statement of claim, the plaintiffs pleaded, inter alia, that the defendants were bailees of the cargo and/or common carriers for reward and were under a duty to exercise all proper and reasonable care in about the loading, stowage, handling, custody, care, carriage and discharge C and delivery of the cargo. The plaintiffs alleged that the defendants breached their obligations as such resulting in the cargo being damaged by water.

The plaintiffs also pleaded that further or alternatively, it was a term of the contract to be implied by law and/or the defendants impliedly undertook that the vessel should be seaworthy at the commencement of the voyage. D

In the circumstances the plaintiffs claimed that the defendants failed to deliver the cargo in the same quantity and in the same condition in which it was shipped and as a result of that the plaintiffs had to indemnify their assured and in turn they had suffered loss, damage and expense.

As such the plaintiffs are making a claim against the defendants, their E servants and/or agent for the sum of RM167,466.39 or alternatively for damages and costs. It is also noted that at the commencement of the hearing learned counsel for both parties agreed that in the event judgment is given to the plaintiffs the amount as stated in the statement of claim is to be accepted in lieu of proof of quantum of damages. The surveyors' fees were F also agreed to be added into the judgment sum.

The defendants are denying liabilities mainly by reasons, in summary, that firstly, they were not common carrier or bailees for reward and neither did they hold out themselves, expressly and/or impliedly, to be such. It was pleaded in their amended defence that the contract between them and the owners of the cargo was one of a charter or hire. It was also alleged that the G owners of the cargo had hired the defendants' barge at a price of between RM23–RM32 per ton and that the owners of the cargo would be responsible for their own marine insurance for their own cargo. Further asserted was that the owners of the cargo had also agreed to pay demurrage charges of between RM850–RM1,500 per day for the barges H hired to them.

Secondly, further or in the alternative it was pleaded in the amended defence that even if the defendants were common carrier for reward (which is denied) the loss, if any, 'was not caused by any negligence on the part of those in charge of the barge and could not have been avoided by the exercise and maritime skill on their servant or agents part' for the reason that the I barge was struck by or came into contact with some underwater objects whilst being maneuvered to berth alongside of the jetty.

In short, the defendants denied any breach of duty to take reasonable care and alleging that being their only duty. Even if they were under a duty to provide seaworthy vessel, they had done so as evident by the fact that the vessel chartered to the cargo owner was afloat for 16 days from the commencement of the voyage before sinking.

At the commencement of the trial, the parties submitted the agreed facts and issues to be tried.

The agreed facts marked 'AF-1' states as follows:

1 At the material time, the plaintiffs were the insurers of the cargo at whose risk the cargo was shipped and are subrogated to the rights of the owners.

2 The defendants acknowledged the shipment of the cargo on the vessel evidenced by a mate's receipt dated 27 March 1995.

3 Between 27 February 1995 and 10 March 1995, a cargo comprising of 15,107 bags of Muriate of Potash weighing 755,350 metric tonnes in laminated PP bags, 50kg per bag ('the cargo') at Messrs Sabah Timber Company's Jetty, Jalan Laila, Sandakan. The cargo was to be delivered to the Asiatic Development Bhd Sri Tenegang Estate Jetty Sukau, Sandakan.

4 The barge departed from Sandakan on 10 March 1995 and arrived at the Asiatic Development Bhd Sri Tenegang Estate Jetty on 11 March 1995. Discharging of the cargo commenced on 14 March 1995, 0900 hours. During the discharge operation at about 2000 hours, the defendants and/or their servants and/or agents noted that the stern/aft part of the barge was listing to the starboard side and was partially submerged and that the cargo stowed/stacked at the aft part of the barge had collapsed with a substantial number of bags lost into the river.

5 The barge subsequently listed heavily towards the port side and the aft part of the barge became further submerged causing the cargo stowed at the starboard side over a length of about 20m from the stern/aft of the barge to collapse with mist bags being washed overboard by the water current.

6 The defendants failed to deliver the cargo in the same quantity and in the same condition in which it was shipped.

7 The barge arrived at Sri Tenegang Estate on 11 March 1995 at about 0800 hours and was brought alongside the jetty to discharge her cargo.

8 As the jetty was at the time occupied by another barge 'Hai Heng No 49' discharging the cargo, the barge had to wait her turn.

9 On 14 March 1995 at about 0930 hours, discharge of the cargo commenced and stopped at about 1700 hours. At the material time, the river was flooded.

10 At about 2000 hours of the same day, the barge was noted to be listing to her starboard side with water washing on deck at the aft section.

11 Attempts to refloat the barge commenced immediately on 14 March 1995. On or about 21 March 1995, the barge was refloated at about 0600 hours.

12 The salvaged cargo was sold to Messrs Yu Kwang Development Sdn Bhd.

In respect of the agreed issues to be tried, 'AI', they are listed thus: A

1 Whether the damage/loss was caused by an underwater object(s) coming into contact with the barge whilst being maneuvered to berth alongside the jetty on or about 11 March 1995; and

2 Whether the dumb barge 'HAI HENG 26' was seaworthy, and/ or cargo worthiness before and at the commencement of this subject voyage. B

However, despite the agreed issues, learned counsel for the defendants in his final submission raised the point that his clients were private carriers and not common carriers as alleged and thus, the nature of liability differed.

The added issue was objected to by learned counsel for the plaintiffs and argued that the defendants should be estopped from raising such issue C in view of the earlier agreement. I will deal with this matter later on.

At this stage, I propose to address first the application by the defendants to reamend the defence as indicated by their learned counsel in his final submission. The proposed amendment was in respect of para 4 of the amended defence so that the number of holes would be reduced to two instead of four holes as earlier pleaded. Such move was objected to by the D plaintiffs with submission from their learned counsel in these words:

> With respect, the plaintiffs are greatly prejudiced by the late amendment at this stage. No citing of which order of the Rules of the High Court was made by the defendants. In fact at the original defence, the defendants have pleaded two holes, but this was subsequently amended to four holes (as they seemed E fit and proper).
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> No grounds for reamendment (sic) was given. In fact the exh 'P1' was clearly marked and identified with four holes by their very, own witness DW3.
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> There is (sic) no authorities put forward by the defendants in support of their late reamendment. Also, there is no explanation ever given as to why they applied this late application, not earlier. In opposition this late reamended F Defence application, we rely on the following cases:
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> (1) *Lim Yong Swan v Lim Jee Tee & Anor* [1993] 1 SLR 500;
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> (2) *The 'Virginia Rhea'; China Steel Corporation & Anor v The 'Virginia Rhea', Owners of* [1985] 2 MLJ 1;
>
> (3) *Chin Kok Kwong Construction Sdn Bhd v Sunrise Towers Sdn Bhd* [1986] G 2 MLJ 41;

Having considered the positions of the respective parties and the fact that the application to reamend the amended defence was made in the submission itself I am therefore inclined to agree with the contention of the learned counsel for the plaintiffs that it should not be allowed and H I therefore refuse to exercise my discretion accordingly.

As regards the additional points raised by learned counsel for the defendants, despite the agreed issues to be tried, I would first consider the question of whether there is a distinction between the two types of carriers, common and private.

In the case of *The 'Asia Star'; Lam Huat Lighterage Co v Owners of* I *Freight and/or Cargo on MV 'Asia Star' and/or Proceeds of Sale thereof* [1980] 1 MLJ 261, Chua J said this at p 264:

A The law is clearly set out in Vol 5 *Halsbury's Laws of England* (4th Ed) paras 302–303. To make a man a common carrier he must carry the goods as a public employment; he must carry for all indifferently; he must hold himself out as ready to carry for reward so long as he has room; he must hold himself out ready to carry for hire, at a reasonable rate, as a business and not as a casual occupation for a particular occasion. The question whether a man is a B common carrier or not is in every case a question of fact. A man may be a common carrier without so styling himself. The question is not determined by a man's description of his own business, though it may be inferred from its character that he is a common carrier.

In yet another case of *Nyalchand Motichand & Co v AS Mohamad Mydin; V Varusay Rawther, third party* [1952] MLJ 190 (CA), his Lordship C Mathew CJ said this at p 192:

In my view, the defendant professed to carry on the business of a lighterman, and his liability is only restricted if it can be said that his membership of the Association deprives him of the character of a lighterman who exercises a public employment. I am of the opinion that it does not. The lightermen of D Penang hold themselves out as willing to carry goods for all and sundry but, by a domestic arrangement amongst themselves, agree not to carry for firms or individuals which have registered agreements with other lightermen. It is an arrangement which is agreeable to the lighters as it tends to prevent undue competition, and is convenient to the merchants of Penang as the lightermen they employ will always ensure as in the present case, that lighters are always made available for the carriage of their customers' goods. The fact that the E defendant 'should not' carry for the registered customers of other members of the Association does not in my view place him in the class of a carrier who will only carry for a favoured few and is therefore relieved of the extended liability attaching to a common carrier.

And in '*The Golden Lake*' [1982] 2 Lloyd's Rep 632, it was held, inter alia, F that on the evidence the defendants were the carriers; they were not a party to the contract evidenced by the bill of lading as it did not purport to make them a party; the bill of lading was not signed on their behalf or for their benefit; the defendants were therefore common carriers and liable to the plaintiffs for the full measure of their loss; the plaintiffs had established that the damage could only have happened while the goods were in the custody G of the defendants and there would be judgment for the plaintiffs.

From the above cases it is obvious that there are differences between common carriers and private carriers particularly in term of exposure to liabilities. In this case if the defendants are considered as common carriers, the duty of care expected is more onerous. A common carrier is absolutely H responsible to the owner of the goods carried for any loss or damage to them. In *Payne & Ivamy's Carriage of Goods by Sea* (13th Ed) at p 179 states, inter alia:

If he is a common carrier, he is absolutely responsible to the owner of the goods carried for any loss or damage to them unless caused by:

I (i) an act of God; or

(ii) an act of the Queen's enemies; or

(iii) inherent vice in the goods themselves; or

(iv) the negligence of the owner of the goods; or

(v) a general average sacrifice.

The general obligation of a common carrier of goods to carry the goods safely whatever happens renders it unnecessary to import into a contract of carriage a special warranty of the seaworthiness of the vessel, for if the goods are carried safely the condition of the vehicle or vessel is immaterial, and if they lost or damaged, it is unnecessary to inquire how the loss or damage occurred (see *Readhead v Midland Rly* (1869) LR 4 QB 379 at p 383).

For a private carrier although it is not absolved from all liabilities to the owner of the cargo its duty is not as onerous. A private carrier is basically under a duty to exercise due care and diligence as a bailee for reward. In *Century Mining Ltd v Loo Kee Trading Co & Anor* [1982] 1 CLJ 33 it was held that a private carrier of goods or of passengers is under a duty to exercise reasonable care in his carriage as bailee. He is liable for damages, loss or delay resulting from negligence or from intentional acts inconsistent with the owner's rights in the goods.

Now the approach taken in this case was without that distinction in mind due to the agreed issues settled before the trial began. Hence, for the defendants to raise such an issue at the close of the trial was an 'ambush' upon the plaintiffs which by then have concluded their case and thus helpless in adducing any further evidence to prove which category the defendants should belong to. Although those points were pleaded in the amended statement of claim the agreement on the issues to be considered did divert the attention of the plaintiffs from dealing with them. Not surprising therefore when learned counsel for the plaintiffs submitted thus:

By agreement before the parties, the issues were narrowed down to two areas. There are only two issues. Firstly, whether the loss/damage was caused by an underwater object. Secondly, whether the barge was seaworthy and/or cargo worthy before and at the commencement of the voyage. We wish to draw Your Lordship's attention that the learned counsel from the defendants Edwin Tsen had in fact and in truth agreed and consented before this honourable court, in the presence of our Peter Vung that there would only be one issue to be tried (abandoning other issues), which was the causation of the mishap at the pre-trial conference held on 6 October 1999. Further reference is also made to lines 5–9 at p 2 of the notes of proceedings. At no time the defendants sought to argue other issues in this honourable court. Thus, we submit that the defendants are estopped, refrained from arguing other issues that were not agreed at all. Whether the plaintiffs were common carriers, private carriers and/or as bailees of the cargo and/or whether they are carriers of goods as opposed to carriers of goods by sea does not come within the scope of the agreed issues. Accordingly, in seeking to raise these points now the defendants are effectively seeking to renege upon their agreement to limit the issues.

In the circumstances of this case, I am inclined to agree with learned counsel for the plaintiffs that it was too late for the defendants to raise such issues which were not part of the agreed issues to begin with.

At any rate, in my view, it is quite immaterial whether the defendants are classified as common carriers or private carriers or bailees for reward as such classification would still not absolve the defendants from liability if it

A can be proven that they were in breach of the standard of care expected from each category of carriers. I would therefore go so far as to glean the relationship of the shipowner and the cargo owner to have been on the basis of a contract for carriage of goods by sea. Hence, I am in agreement with learned counsel for the plaintiffs on the position of the law when he submitted thus:

B

> Whether the defendants were acting as a common carrier or a private carrier is immaterial. Every contract for the carriage of goods by sea or water is subject to an implied undertaking by the carrier to provide a seaworthy ship unless such undertaking is expressly excluded (see p 5 of PFBOA; CARVER: Paragraph 140). At common law a shipowner by contracting to carry goods
> C on a voyage in a ship, impliedly undertakes that his ship is seaworthy. This implied undertaking arises not from the shipowners position as a common carrier, but from his acting as a shipowner (see p 6 of PFBOA; SCRUTTON: Article 51, citing *Kopitoff v Wilson* (1875-76) 1 QBD 377; see p 94–100 of PFBOA). Accordingly, whether the shipowner is acting as a Common or Private Carrier is irrelevant. The obligation to provide a seaworthy ship arises
> D from the shipowner, in his capacity as a shipowner contracting to carry goods on a voyage in a ship. There is no express stipulation which affects or modifies this duty which applies to the voyage of the 'HAI HENG NO 26'.
>
> Further, the obligation to provide a seaworthy ship is an overriding obligation. The shipowner is liable at common law for failure to make the ship seaworthy in fact, although he may have taken all reasonable pains and
> E precautions to do so. He undertakes absolutely that the vessel shall be fit, on sailing upon the voyage, to carry the cargo which she has on board, and with it to encounter safely whatever perils a ship of that kind may fairly be expected to be exposed to in the course of that voyage at that season of the year. It appears then that the shipowner undertakes responsibility for any defects in the ship, or her machinery or equipment; even for defects not discoverable by careful examination (see p 9 of PFBOA; CARVER: Paragraph 145).

F

Based on the foregoing, a quick examination of the respective legal positions taken and obligations of the parties would therefore be useful.

It was the stand of the defendants that since the cargo had arrived at the destination their obligation as a private carrier, namely, to take, in his capacity as a bailee for reward, reasonable care of the goods and take
G reasonable care to convey them to their destination had been satisfied. In response the plaintiffs submitted that upon arrival at the destination the cargo remained in the possession of the owner of the barge and when it appeared to be listing only 900 bags were off loaded. The plaintiffs maintained that the 'obligation to take reasonable care includes the period
H when cargo remains on board the barge at the jetty in the possession and under the control of the shipowner applying even the most basic principles of bailment.' With respect, I agree with the principle of law as stated by learned counsel for the plaintiffs. Since there was no dispute as to the location of the cargo at the material time, I do not think there is any merit in the contention of the defendants and I decline to accept it.

I It was also contended for the defendants that there was no specific plea in the statement of claim that the defendants undertook the carriage by sea. Hence, the absolute warranty of seaworthiness should be excluded.

On perusal of the statement of claim, I think the plaintiffs are correct to say that it was self-evident that the carriage of the cargo of Muriate of Potash from the Sabah Timber Company's Jetty to the Asiatic Development Bhd, Sri Tenegang State Jetty was carriage by sea. Further, the amended paras 7 and 8 of the statement of claim specifically make reference to an obligation on the part of the defendants that the vessel was seaworthy at the commencement of the voyage and that there was a breach of this term. Moreover, the letter dated 2 December 1994 relied upon by the defendants made reference to 'sea transportation fees'. As such, I do not find as well any merit this particular contention of the defendants. In any event, it was conceded by learned counsel for the defendants in his submission that the only obligation of the defendants was to furnish a seaworthy ship at the commencement of the voyage.

Now that the issue of seaworthiness of the barge 'Hai Heng No 26' is in question, I should deal with it first although it is the second agreed issue.

Based on the pleadings of the parties in this case, I am of the view that there is little dispute between them that the obligation of the defendants under common law or as implied by law is absolute in nature to provide a seaworthy ship at the commencement of the voyage. I agree with learned counsel for the plaintiffs that since 'the Hague/Hague-Visby Rules have not been pleaded, nor reference made to any specific incorporation of these rules in the amended points of defence ... the only obligation of seaworthiness is the absolute obligation imposed by common law'.

The nature of the absolute obligation of a shipowner is that it encompasses the responsibility of any unseaworthiness of the vessel provided regardless of the cause, negligence or otherwise. In the present case, the disclosure of the repair works by Weldan Marine Services Sdn Bhd on 'Hai Heng No 26' is of little assistance to their absolute responsibility of providing a seaworthy ship at the commencement of the voyage.

Learned counsel for the defendants in his final submission brought up the applicability of the Carriage of Goods by Sea Act 1971 (UK). The effect of that statute is that the defendants would have been only obliged to 'exercise due diligence to make the ship seaworthy and to man and equip her properly and make the holds and refrigeration and cooling chambers and all other parts of the ship in which the goods are carried, fit for their reception, carriage and preservation'. As to loss and damage, learned counsel for the defendants also submitted that his clients are only liable for the loss or damage to the cargo due to specified perils and due to any other cause arising without the actual fault or privity of the carrier and without the fault or neglect of the agents or servants of the carrier.

However, on perusal of the materials before me, I am in agreement with learned counsel for the plaintiffs that such inclusion has no basis either under the contractual documents or as a matter of law.

As regards to the definition of 'seaworthiness' of a ship, I find that from the respective submissions of learned counsel for the parties, there is no dispute as to its proper definition and I agree with them. Both relied on *Halsbury's Laws of England* which states thus, at para 596:

> To render the ship seaworthy for the purpose of the voyage, she must, at the time of sailing, be in a fit state as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of the voyage at the particular season in question. ... Moreover, the undertaking is broken, although the ship may be in a state of fitness at the moment of sailing, if by reason of a latent defect or internal weakness existing at that time she will be rendered unfit in the future for due completion of her voyage.

There have been also English judicial decisions providing guideline or standard on the determination of whether or not a vessel is seaworthy (see *Gibson v Small* (1853) 4 HLC 353, *Burges v Wickham* (1863) 3B & S 669 and *Bradley v Federal SN Co* (1926) 2 LR 446). Basically, the expectations are that the 'vessel must have a degree of fitness which an ordinary careful and prudent owner would require his vessel to have, at the commencement of her voyage, having regard to all the probable circumstances of it. To that extent, the shipowner, as we have seen, undertakes absolutely that she is fit; and ignorance is no excuse. If the defect exists, the question to be put is, would a prudent shipowner have required that it should be made good before sending his ship to sea, had he known of it? If he would, then the ship was not seaworthy within the definition of the meaning'.

Relying therefore on the foregoing definition, learned counsel for the plaintiffs submitted that his clients' 'need not demonstrate an ingress of water at the time of the commencement of the voyage to prove unseaworthiness. Applying the defendants' own authority, the obligation of seaworthiness is broken if, there is an "internal weakness" which will render the vessel unfit at some point in the future for completion of the voyage'.

Learned counsel for the plaintiffs went on to say this:

> The plaintiffs do not need to prove evidence of the existence of the holes at the commencement of the voyage to demonstrate unseaworthiness, and there is no legal basis (no authorities ever put forward by the defendants in support of their argument) upon which the defendants can sustain an argument that the defect which caused the sinking must be present at the commencement of the voyage in order to prove that the barge was unseaworthy.
>
> As the defendants acknowledge at para 20 of their closing submissions, the fact that a ship sinks or leaks without there being any storm or other apparent reason to account for her condition or loss is prima facie evidence of unseaworthiness and shifts to the shipowner the burden of proving that the vessel was in fact seaworthy at the time of her departure.

The above was in response to the submission of learned counsel for the defendants that the 'whole issue is that the plaintiffs allegation that the barge was not seaworthy at the commencement of her voyage and it is their burden to prove so. None of their witnesses could prove that the holes occurred at the commencement of the voyage making it unseaworthy. DW3 had himself admitted that the holes could happen after the barge had arrived at its destination. There is not one iota of evidence that the holes were there at the time the barge commenced her voyage'.

Further argument on the burden of proof went on when learned counsel for the defendants submitted thus:

> The cargo owner must prove affirmatively that the ship was unseaworthy and that the unseaworthiness caused the damage.

In answer, learned counsel for the plaintiffs alleged that para 604 of *Halsbury's Laws of England* had been misinterpreted as it stated thus:

> The burden of proving unseaworthiness rests upon the shipper. The fact that the ship becomes leaky or goes to the bottom shortly after putting to sea, without there being any storm or other external factor to account for her condition or loss, is prima facie evidence of unseaworthiness, and shifts to the shipowner the burden of proving that she was in fact seaworthy at the time of her departure. If, however, the shipowner proves that the damage was caused by some matter falling within the exceptions, then the cargo owner must prove affirmatively that the ship was unseaworthy and that that unseaworthiness caused the damage.

It was therefore the submission of learned counsel for the plaintiffs that the burden of proof would only revert to the cargo owner to 'prove that the barge was unseaworthy if the shipowner proves that the damage came from a cause falling within an excluded exception. The 'exceptions' are either expressly incorporated into the Voyage Charterparty by a contractual term, or by the applicability of the Hague or Hague-Visby Rules through a Clause Paramount. No exceptions have been pleaded or referred to by the defendants nor has any attempt been made to adduce evidence to prove that the cause of the sinking came within any such exceptions. This is not surprising since the obligation to provide a seaworthy barge is an absolute obligation. As it is, the cause of the sinking, if not caused by corrosion, remains something of an unsolved mystery with no factual evidence put forward by the defendants to explain the exact cause of the sinking'.

Having considered the legal principles as outlined by learned counsel for the parties and in the circumstances of this case, I am inclined to agree with learned counsel for the plaintiffs that the burden is on the defendants to prove that the barge was seaworthy at the commencement of the voyage on 10 March 1995.

In the present case, I did not find such task having been undertaken by the defendants. In fact, there was no explanation offered by the defendants why there was corrosion in the vicinity of the holes found at the hull of the barge. Indeed DW3 Mr George Wong, agreed that rust would not appear suddenly.

Accordingly, I agree with learned counsel for the plaintiffs that since the defendants did not adduce 'any evidence to demonstrate that the 'Hai Heng No 26' was seaworthy (this being an absolute obligation) at the time of her departure' ... the prima facie evidence of unseaworthiness (due to the sinking of the barge without any external elements explaining for her loss) has not been rebutted'. I therefore agree that on the foregoing premise alone, the inevitable conclusion is that the barge 'Hai Heng No 26' was not seaworthy at the commencement of the voyage and my finding on the second agreed issue is therefore in the negative. Thus, the claim of the plaintiffs should succeed.

A In the event that I am wrong in the above and that the burden of proving that the barge was not seaworthy lies with the plaintiffs, I will therefore proceed to examine the evidence adduced in this case and further consider whether there is any substance on the assertion of the defendants that the barge came into contact with submerged object or objects as it was being maneuvered to berth at the jetty of the destination.

B Meanwhile, I am in agreement with the submission of learned counsel for the plaintiffs that 'unseaworthiness does not have to be the dominant cause, but a cause, or a real, effective cause, of the loss', (Lord Wright in *Smith, Hogg & Co Ltd v The Black Sea & General Insurance Co Ltd* 162 LT 11, [1940] AC 997, Scrutton: Paragraph 144). Accordingly, it is enough for C the plaintiffs to demonstrate (should the onus be upon them to do so) that one or more of the holes in the hull, through which a water ingress took place contributed to the sinking of the vessel, assuming that it can be proved that such holes appeared through unseaworthiness of the vessel at the commencement of that voyage'.

D Now, the evidence of the parties on the agreed issues varied. As regards the condition of the barge the defendants called several witnesses. Mr Chai Chee Thin, DW1, the managing director of the defendants testified that the barge underwent repairs sometime in November and December 1994 at a cost of over RM100,000 by Weldan Marine Services Sdn Bhd. The repairs were done to the whole of the bottom plates, patching the bottom plates and E the rewelding of corroded holes. Prior to the servicing and repairs in December 1994, the said barge was hired out to various charterers and was used mainly to transport fertilizers to Tenegang, Sabah Palm Estate, Pamol, Sandakan, Kudat and other vessels and places. After the said barge was serviced and repaired, it was again used to transport fertilizers for various charterers. The said barge was towed by Tug Boat 'Hai Heng No 50' which F was under the charge or control of Totuh bin Ali, who was then the acting master with four other crew members. DW1 further testified that according to the time sheet, the tug boat and the barge arrived at Tenegang at 7am on 11 March 1996 and had to wait for its turn to discharge as the jetty was being occupied by another of the defendants' barge discharging her cargo. G Unloading of the fertilizer commenced at about 9.50am on 14 March 1995.

DW1 went on to say that the captain of the tug boat, Totuh, made a marine protest note on 17 March 1995 to state that he heard some objects striking the bottom of the said barge. He also testified that the said Totuh, an engine driver by the name of Abdul Rashid and the crew that were on the H tug boat and the barge that day were no longer working for the defendants and their whereabouts could not be determined.

Another witness, Mr Wong Chi Peng @ George Wong, DW3, a supervisor for Kasi Adjusters & Surveyors, testified that he attended on board and inspected the barge on 23, 24, 27 and 29 March 1993 at Hai Heng Jetty, Sandakan after receiving instructions from Sime Axa Assurance I Berhad, Sandakan on 20 March 1995. He went on to say that he was unable to attend at Tenegang Estate Jetty immediately upon receipt of instruction as the assured's personnel had earlier left for Tenegang Estate to conduct

the salvage themselves. After refloating, the said barge was towed to Hai Heng Jetty, Sandakan where damage inspections were conducted. The inspections were conducted jointly on 23, 24, 27 and 29 March 1995 together with Mr Chow Yew Ming ('DW2') and Mr Ambrose Lee Heun Lin ('PW2') of Inchape Testing Services representing Jerneh Insurance. During the joint inspection of the said barge, DW3 testified that he noted the following damage to the barge:

(a) at the aft (swim end) void compartment starboard side, One hole about 25mm in diameter located between starboard side, frames Nos 2–3 about 30cm from bottom plating;

(b) second from aft, void compartment portside:

—One hole about 15mm in diameter between bottom longitudinal frames Nos 5–6 about 2m from aft transverse bulkhead.

(c) Aft (swim end) void compartment longitudinal buckhead between port and starboard side plating (Corroded).

— One hole 5mm in diameter located 15cm below third frame and 40cm from forward transverse buckhead: and

— One hole, 5mm in diameter located between frames Nos 2–3 about 15cm from first vertical frame.

DW3 also testified that he was unable to inspect the barge's bottom and only the bottom plating of the aft swim end was noted and he found plating at swim end to be in order with exception of the hole of 25mm was found.

DW 3 said that the bottom plating holed at portside was not inspected as the barge was beached on muddy beach while the internal compartment was found to be wet and rust stained were over all the bottom plating and frames. He, however, noted that no severe indentation was noted at the holed section of port and starboard side plating.

He further testified that the other two holes found under item No 3 above were at longitudinal transverse bulkhead plating, the holes of 5mm each (due to corrosion) appear to have resulted in water leaking into the other side of the compartment, ie portside.

DW3 expressed his conclusion that he was inclined to believe the statement of the tug master that the barge had come into contact with some underwater objects as the 25mm and a 15mm diameter holes on barge's bottom plating were unlikely to be caused by the effect of corrosion only within days of the tow.

For the plaintiffs three witnesses were called Mr Kwan Chee Kien ('PW1'), a cargo surveyor with ITS Testing Services testified that on 18 March 1995 he was present at the site of the incident at the Tenegang Jetty for the purpose of inspection of the cargo. When he arrived, he noticed that the barge was partially submerged in the water and tide was very high. In that situation, he testified he was unable to inspect the state of the barge from the outside. He, however, believed that the hull plating of the barge at that time was in a state heavy corrosion based on the photographs numbered 33–36 inexh B.

A Mr Ambrose Lee Heun Lin ('PW2'), another witness called by the plaintiffs, testified that he was present at Sandakan Jetty to inspect the barge from 23, 24 and 27 March 1995. During the inspection, he took some photographs (numbers 23–56 (except 55) of exh A), which showed that the bottom plating was in the state of heavy corrosion and there were signs of wastage of internal strength members and this corrosion in his opinion B would have been present for a considerable period of time. He was also of the opinion that if a barge was hit by an underwater object there must be clear and severe indentation, scratches and marks at the vicinity of all the four holes but in this case there were no such signs of indentation, scratches or marks at all.

C Encik Abdul Rahman bin Gapor ('PW3'), the Area Manager of ITS Services testified that he agreed with evidence of PW2 that the damage to the hull plating of the dumb barge could be attributed to corrosion and pitting at the affected areas which would have developed into holes or perforations due to the mechanical hydrostatic stresses. He also testified that from his past experience, if a vessel was hit by an underwater object, D there would be indentation, marks or signs of physical impacts at the vicinity of the holes of the bottom plating. However, in the present case, based on the photographs 29–34 of exh A, there was no sign of indentations or scratches.

Based on the testimonies of the witnesses, the court would have to E consider on the balance of probabilities whether the barge was hit by an unknown underwater object/s; or whether the barge submerged as a result of corrosion of the bottom plating.

The allegation that the barge collided with an underwater object/s in this case came from one Totuh Ali, the tugboat master, who claimed that on 11 March 1995, as he was towing the barge to berth at the jetty, he heard F a loud noise coming from the bottom of the barge. He filed a marine protest note on the 17 March 1995. Unfortunately, Totuh was not available as a witness. The defendants, therefore, have no direct evidence to prove the above allegations and because of this the defendants had to rely mostly on the evidence of DW3 to establish the above facts. It is to be noted that there G was no evidence adduced to show that attempts were made to contact Totuh. The court may invoke s 114(g) of the Evidence Act 1950 thereby providing an adverse inference to be drawn against the defendants.

However, in my view, DW3's testimony is of very limited value. For example, when he was asked on the causation of the holes that were found at the bottom of the barge he stated that he believed the holes were caused H by the impact of the underwater objects against the bottom of the barge and this opinion was formed based on the Totuh's marine protest note. Later, when he was cross-examined on whether there was any sign of indentations during his inspections on 27 and 29 March, he stated as follows:

Q: In your past experience, is indentation visible if the plating hit an object?

I A: Depends on the impact.

Q: In your past experience, can you give your opinion what should be the object to make the holes of 15mm and 25mm?

A: It is an underwater object.

Q: Example.

A: Maybe rock, wood or sharp objects.

(Witness referred to photographs 34 at p 80 of exh B.)

Q: Is the hole regular round in shape?

A: It is not really regular round in shape.

Q: At the vicinity of the hole, is that corrosion?

A: No.

Q: Did you inspect the condition of the scow?

A: Yes.

Q: When was it?

A: It is written in the statement.

Q: Is it 23, 24, 27 and 29 March 1995?

A: Yes.

Q: No other dates?

A: No.

Q: On 23 and 24 March 1995, is it true that you were unable to inspect the internal compartment?

A: Yes I couldn't inspect.

Q: You saw the four holes on 27 and 29 March 1995?

A: Yes.

Q: What were the condition. Any indentation?

A: Yes.

Q: Any signs of physical impact?

A: Yes.

(Witness shown pp 15–89 of exh B.)

Q: Can you point where is the indentation or evidence of physical impact in the Kasi Survey Report including the photographs?

A: (Witness carefully examines report) Not in the report.

Q: Did you see any scratches and marks at the vicinity of the four holes?

A: No.

Q: Is it likely to see scratches and marks at the vicinity of a hole if it is hit by a hard object that is the outer plating?

A: Yes if it was hit by an object.

Q: Is it likely to see indentation and signs of physical impact at the vicinity of a hole if it is hit by a hard object?

A: Yes.

Q: Do you agree that the object which allegedly hit the scow should be strong, solid, hard and firm in nature in order to penetrate the plating?

A: Yes, but still depends on the impact and force.

To come to a finding on the agreed issues, in particular on agreed issue one, the competing versions of the witnesses of the parties require close examination.

PW2 was the surveyor sent to inspect the barge at the Sandakan Jetty and he testified that he inspected the holes at the bottom of the plate and found that there was no sign of indentations or scratches which would normally be visible with the type of incident alleged by the defendants. In fact, he found that the probable cause for the barge to submerge in this case was due to the heavy corrosion of the bottom plate.

Comparing that testimony to that of DW3, I am inclined to accept the evidence of PW2. His evidence of the corrosion was also supported by the photographs taken (Nos 29–34 of exh A).

In fact, DW3 who was also present during the inspection confirmed that that the areas in the vicinity of the holes were in a rusty state but he disagreed that the areas were in the state of corrosion.

Under cross-examination, DW3 was asked thus:

(Witness referred to DW3, at p 4 para 8)

Q: At the time of your inspection, the condition of the platings was rusty and corroded and they were there before your inspection?

A: Rusty, yes but not corroded.

Q: They could be there many years ago before your inspection.

A: That I cannot say. I cannot confirm.

Q: But you would agree that the rust could not be there suddenly at the time of your inspection. Yes or no.

A: Yes.

PW2 testimony on this aspect was also corroborated by the evidence of PW3. Even though PW3 was not present during the inspection his years of experience in the industry and from the photographs submitted to him by PW2 his conclusion should carry some weight. I am also inclined to accept the testimony of PW3 that Totuh could not have heard any impact at the bottom of the barge as he was quite far away. The distance between the tugboat and the dumb barge was about 15–20m. Moreover, the tide was rising at the time of incident. The exact position of Totuh at the time of incident was at the master's room situated in front of the tugboat and the alleged impact was at the bottom of the barge and given the enormous size of the dumb barge as testified it could have been almost impossible for the tugboat master to be able to hear the alleged impact. It is unfortunate that the tug master could not be present in court for examination as a witness.

I am further inclined to accept the evidence of PW2 that if the dumb barge was in fact hit by an underwater object on 11 March 1995 about 7.30am there was no explanation as to why then only at about 6.30pm on 14 March 1995 that the dumb barge began to list toward the starboard side.

If indeed the barge was hit on 11 March 1995 when the tide was rising, and thus, the pressure of water was higher resulting in more aggressive ingress of water, the dumb barge would have started to list or submerge into water because of the continual ingress of water into the compartments. This could have been noticed within few hours on 11 March 1995 and not after some 82½ hours later.

For the foregoing reasons and based on the evidence adduced, I am satisfied on the balance of probabilities that the version of the plaintiffs is more credible. It follows that it is my finding of fact, the barge was unseaworthy at the commencement of the voyage. I also find that the assertion of it having coming into contact with submerged object as it was maneuvered to berth to be most unlikely to have happened.

Accordingly, for the reasons hereinabove, judgment is hereby entered for the plaintiffs for an agreed sum of RM167,466.39 plus surveyors' fees to be determined on production of invoices. There shall also be interest on the said sum of RM167,466.39 at the rate of 8%pa pursuant to s 11 of the Civil Law Act 1956 from the date of the writ of summons in personam to the date of judgment and statutory interest at rate of 8%pa from the date of judgment to the date of actual full payment and costs to the plaintiffs for this action to be taxed unless agreed.

Plaintiffs' claim allowed.

Reported by Lim Lee Na